Supreme Court, U.S.
FILED
JUL 11 1988
JOSEPH F. SPANIOL, JR.
CLERK

Nos. 87-1946 and 87-7011

In the Supreme Court of the United States

OCTOBER TERM, 1988

RONALD J. PERHOLTZ, PETITIONER

v.

UNITED STATES OF AMERICA

FRANKLIN W. JACKSON, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

CHARLES FRIED
Solicitor General
EDWARD S.G. DENNIS, JR.
Acting Assistant Attorney General
JOEL M. GERSHOWITZ
Attorney

Department of Justice
Washington, D.C. 20530
(202) 633-2217

QUESTION PRESENTED

Whether the jury instructions permitted petitioners to be convicted for conduct that, under *McNally* v. *United States,* No. 86-234 (June 24, 1987), does not violate the federal mail fraud statute.

TABLE OF CONTENTS

	Page
Opinions below	1
Jurisdiction	2
Statement	2
Argument	6
Conclusion	13

TABLE OF AUTHORITIES

Cases:

Carpenter v. *United States*, No. 86-422 (Nov. 16, 1987) . . 5, 7, 8
McNally v. *United States*, No. 86-234 (Jan. 24, 1987) 4, 6, 7
Pope v. *Illinois*, No. 85-1973 (May 4, 1987) 10
Rose v. *Clark*, 478 U.S. 570 (1986) 11, 12
United States v. *Fagan*, 821 F.2d 1002 (5th Cir. 1987), cert. denied, No. 87-589 (Jan. 11, 1988) 7
United States v. *Horton*, 847 F.2d 313 (6th Cir. 1988) 10
United States v. *Jacobs*, 475 F.2d 270 (2d Cir.), cert. denied, 414 U.S. 821 (1973) 11
United States v. *Piccolo*, 835 F.2d 517 (3d Cir. 1987), cert. denied, No. 87-1465 (May 31, 1988) 7, 9, 12
United States v. *Richerson*, 833 F.2d 1147 (5th Cir. 1987) 7, 9, 12
United States v. *Wellman*, 830 F.2d 1453 (7th Cir. 1987) 10
United States v. *Young*, 470 U.S. 1 (1985) 9

Statutes and rule:

18 U.S.C. 1341 . . . . . 2, 4
18 U.S.C. 1962(c) 2
41 U.S.C. 51 11
Fed. R. Crim. P. 52(b) 9

In the Supreme Court of the United States

OCTOBER TERM, 1988

No. 87-1946

RONALD J. PERHOLTZ, PETITIONER

v.

UNITED STATES OF AMERICA

No. 87-7011

FRANKLIN W. JACKSON, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals affirming petitioners' convictions (Pet. App. A1-A51)[1] is reported at 842 F.2d 343. The opinion of the court of appeals denying petitioners' motions for release pending appeal (Pet. App. B1-B15) is reported at 836 F.2d 554.

---

[1] "Pet. App." refers to the appendix to the petition in No. 87-1946.

JURISDICTION

The judgment of the court of appeals was entered on March 8, 1988. The petitions for a writ of certiorari were filed on May 9, 1988, and are therefore out of time under Rules 20.1 and 29.1 of the Rules of this Court. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

After a jury trial in the United States District Court for the District of Columbia, petitioners each were convicted on one count of racketeering, in violation of 18 U.S.C. 1962(c), and 13 counts of mail fraud, in violation of 18 U.S.C. 1341. Perholtz was sentenced to a total of ten years' imprisonment[2] and was ordered to forfeit more than $700,000. Jackson was sentenced to a total of seven years' imprisonment[3] and was ordered to forfeit a condominium.

---

[2] Perholtz was sentenced to ten years' imprisonment on the racketeering count. He was sentenced to five years' imprisonment on three mail fraud counts that related to defrauding the Postal Service. Those sentences were ordered to be served concurrently with each other and with the sentence on the racketeering count. He was sentenced to five years' imprisonment on the other ten mail fraud counts, which related to defrauding the Small Business Administration. Those sentences were ordered to be served concurrently with each other and with the sentence on the racketeering count, and consecutively to the sentences on the other mail fraud counts.

[3] Jackson was sentenced to seven years' imprisonment on the racketeering count. He was sentenced to two years' imprisonment on the three mail fraud counts relating to defrauding the Postal Service. Those sentences were ordered to be served concurrently with each other and with the sentences on the racketeering count. He was sentenced to five years' imprisonment on the ten mail fraud counts that related to defrauding the Small Business Administration. Those sentences were ordered to be served concurrently with each other and

1. The evidence at trial is summarized in the opinion of the court of appeals (Pet. App. A3-A15). It showed that petitioners devised a scheme to defraud the United States Postal Service in connection with the development of a computerized payroll system, and that they devised another scheme to defraud the Small Business Administration (SBA) in connection with the development of a data communications system.

Petitioner Perholtz was General Manager for Accounting for the Postal Service until December 1977, when he resigned and formed his own computer systems development firm. Petitioner Jackson was the manager of the Postal Service's Systems Redesign Branch, which directed the Postal Service's development of a computerized payroll system. In early 1978, Perholtz suggested to Jackson and John Gentile, the Assistant Postmaster General for Finance, that they "wire" the contract to develop a part of the Postal Service's computerized payroll system called the Automated Time and Attendance Procedures (ATAP) project. Perholtz then entered into an agreement with Essex Engineering under which he would prepare the software for Essex's bid on the ATAP contract. Jackson arranged for a short response time to the Postal Service's request for proposals, and Gentile informed Perholtz in advance of the project's technical requirements. As a result, Essex's response to the request for proposals closely matched the request's specifications, and Essex was the only vendor to provide a demonstration of software as well as hardware. Although the Postal Service had stated that it would not award the contract based on the request for proposals, Jackson prepared a report after the proposals were submitted stating that it was necessary to proceed with the ATAP project quickly. Gentile then

---

with the sentence on the racketeering count, and consecutively to the sentence on the other mail fraud counts.

recommended a noncompetitive award to Essex, and the Postal Service awarded the project to Essex on that basis in March 1979. Perholtz received nearly $200,000 as a result of the scheme. Pet. App. A3-A6.

In May 1979, Jackson left the Postal Service and joined International Business Services, Inc. (IBS), which had a contract to develop a data communications system for the SBA. Jackson became the project manager for the SBA contract and IBS retained Perholtz as a consultant. Perholtz arranged for IBS to award a subcontract under the SBA project to a company that agreed to pay unearned commissions, which were split by Jackson and Gentile for their part in the ATAP scheme. Each of them ultimately received $27,000. Perholtz subsequently arranged for the award of three other subcontracts on the SBA project to companies that agreed to pay kickbacks to him, and he received more than $500,000 through those arrangements. Pet. App. A6-A11. The cost of the kickbacks was paid by IBS, which passed it on to the SBA under its cost-plus contract (*id.* at B10).

2. The mail fraud counts in the indictment alleged schemes to defraud the Postal Service and the SBA of honest procurement processes, to defraud the Postal Service of the honest and faithful services of Jackson and Gentile, and to obtain money by false pretenses and representations (Indictment 41-42, 44). After petitioners were convicted, this Court held in *McNally* v. *United States,* No. 86-234 (Jan. 24, 1987), that the mail fraud statute, 18 U.S.C. 1341, is limited to the protection of property rights and does not protect the intangible right of the citizenry to good government. On appeal, petitioners argued that, in light of *McNally,* their convictions should be reversed.[4]

---

[4] If all the mail fraud convictions were reversed, then the racketeering convictions, which rested on only one predicate act other than mail fraud, would also have to be reversed (Pet. App. B6).

The court of appeals rejected petitioners' contention. The court first concluded (Pet. App. A44) that *McNally* did not require reversal of the convictions on the counts relating to the SBA scheme. The court explained that petitioners' "elaborate kickback scheme" deprived the SBA of property, since it "ensured that the 'negotiated' cost of the subcontracts was higher than the price at which the subcontractors would have been willing to contract, and ensured that this higher cost was passed through to the SBA in its cost-plus contract with the prime contractor" (*id.* at B9-B10).[5] While the jury instructions contained intangible rights language, the court concluded that, read as a whole and in conjunction with the description of the scheme in the indictment, the instructions permitted the jury to return guilty verdicts only if it found that petitioners defrauded the SBA of money through the kickback scheme (*id.* at B11).

The court of appeals also concluded (Pet. App. A44-A46) that *McNally* did not require reversal of the convictions on the ATAP counts. Relying on *Carpenter* v. *United States,* No. 86-422 (Nov. 16, 1987), the court explained (Pet. App. A45) that the "theft of property consisted of [Jackson's] appropriation of confidential information belonging to his employer"—to wit, the design specifications that the Postal Service would require for the ATAP project. The court stated that "[b]y appropriating the confidential information concerning the ATAP specifications and leaking it to Perholtz, Jackson skewed the bidding process and directly impinged upon the

---

[5] The court's rationale for finding that *McNally* did not require reversal of petitioners' convictions on the SBA counts is contained in its opinion rejecting their motions for release pending appeal (Pet. App. B7-B12). The court explicitly relied on that opinion in its opinion affirming petitioners' convictions (*id.* at A44).

government's economic interests" (*ibid.*). Although the court acknowledged that "this case was not presented to the jury under *Carpenter*'s theft of confidential business information rationale," the court nonetheless concluded that "the factual predicate for the jury's verdict necessarily implies that it found that Jackson stole confidential information in violation of the mail fraud statute as interpreted in *Carpenter*" (Pet. App. A46).

ARGUMENT

Petitioners renew their contention that their convictions must be vacated in light of *McNally*. Essentially, they make two claims. First, they argue that the evidence at trial did not show that either the Postal Service or the SBA suffered any property loss as a result of their fraudulent schemes. In addition, they argue that the jury instructions were insufficient to support their convictions.

1. *McNally* involved a scheme in which the defendants, who controlled the selection of Kentucky's workers' compensation insurer, selected an agency that agreed to pay to the defendants a portion of the commissions it received from underwriting insurance companies. The defendants were charged and convicted of mail fraud on the theory that their scheme had deprived the citizens of Kentucky of their intangible right to honest government. Holding that the mail fraud statute is "limited in scope to the protection of property rights" (slip op. 10), this Court reversed. The Court explained that "there was no charge and the jury was not required to find that the Commonwealth itself was defrauded of any money or property" (*ibid.*). In fact, on the record in that case it seemed plain that Kentucky did not lose money because it appeared that nothing the defendants did affected the amount the Commonwealth paid for insurance or the amount the agency received as commissions, as the court

below recognized (Pet. App. B9). Rather, as the Court explained in *McNally*, "the premium for insurance would have been paid to some agency" and, hence, the commissions that the defendants shared "were not the Commonwealth's money" (slip op. 10). All that Kentucky lost, the Court noted in *Carpenter,* was the defendants' "honest and faithful service, an interest too ethereal in itself to fall within the protection of the mail fraud statute" (slip op. 6).

In this case, the court of appeals correctly concluded that the evidence showed that both the SBA and the Postal Service were deprived of property within the meaning of *McNally*. The SBA scheme was a typical kickback scheme through which petitioners received unearned commissions from the SBA's subcontractors. As the court of appeals explained, the result of the scheme was that the SBA paid more to IBS than it otherwise would have paid, since the cost of the kickbacks "was passed through to the SBA in its cost-plus contract with the prime contractor" (Pet. App. B10). Thus, the SBA scheme was quite different from the scheme in *McNally* because the SBA, unlike Kentucky, plainly lost money as a direct result of the scheme. Other courts of appeals have likewise concluded that normal kickback schemes involve property loss within the meaning of *McNally* by inflating the victim's costs. *United States* v. *Piccolo,* 835 F.2d 517 (3d Cir. 1987), cert. denied, No. 87-1465 (May 31, 1988); *United States* v. *Richerson,* 833 F.2d 1147 (5th Cir. 1987); *United States* v. *Fagan,* 821 F.2d 1002 (5th Cir. 1987), cert. denied, No. 87-589 (Jan. 11, 1988).

In concluding that the ATAP scheme caused a loss of property to the Postal Service, the court of appeals correctly relied on *Carpenter*. In that case, this Court upheld the convictions for mail and wire fraud of a Wall Street

Journal reporter and others who traded stock in anticipation of the content of the Journal's "Heard on the Street" column, a well-known feature that often had an effect on the market price of the stocks discussed there (slip op. 3). The Court concluded that the Journal had a property interest in the content and timing of its column (*id.* at 6) and, because the reporter obtained the information in the course of his employment, he was bound not to use it in a manner not authorized by the Journal (*id.* at 8).

Here, Jackson had confidential information concerning the design specifications that the Postal Service would require for the ATAP project that he acquired in the course of his employment. Like the defendants in *Carpenter,* Jackson appropriated the information for his own personal benefit. Under *Carpenter,* the appropriation of confidential information belonging to one's employer plainly falls within the scope of the mail fraud statute, whether or not the employer lost money (slip op. 7). Moreover, as the court of appeals observed (Pet. App. A45), by appropriating the confidential information concerning the ATAP specifications, petitioners clearly impinged on the Postal Service's economic interests in that they skewed the operation of the competitive bidding process, a process that depends on the receipt by all bidders of the same information at the same time.[6]

---

[6] Jackson argues (87-7011 Pet. 15) that, under the decision of the court below, "any circumvention of government contracting procedures would involve a deprivation of intangible property." That is simply not so, since not all cases involving a circumvention of government contracting procedures involve the appropriation and leaking of confidential business information. The court of appeals in this case explicitly refrained from holding that "a government employee's unauthorized use of confidential information always would constitute a mail fraud violation" (Pet. App. A45).

2. Nor were the jury instructions insufficient to support petitioners' mail fraud convictions. Petitioners did not request a "property loss" instruction or object to the charge on the ground that it did not contain such an instruction. Accordingly, their claim must be reviewed under the plain error standard of Fed. R. Crim. P. 52(b). *Piccolo,* 835 F.2d at 519; *Richerson,* 833 F.2d at 1157 & n.26. As this Court has observed, under the plain error doctrine an error does not justify reversal unless it "undermine[s] the fundamental fairness of the trial and contribute[s] to a miscarriage of justice." *United States* v. *Young,* 470 U.S. 1, 16 (1985).

The jury instructions relating to the SBA scheme, while containing some language regarding intangible rights, required the jury to find that the SBA lost money. The district court explicitly defined a "fraudulent scheme" as a plan "to obtain money or property" by false pretenses or representations (Pet. App. C74). In addressing the SBA scheme specifically, the court described it as one "to defraud the SBA of its lawful right to conduct its business and affairs free from kickbacks, deceit, fraud, misrepresentation, theft and breaches and omissions of fiduciary and contract duties and to obtain money by false and fraudulent pretenses and representations" (*id.* at C83, C95-C96). The court never separated the objectives of the scheme in its charge or told the jury it could convict on one theory alone. Furthermore, the district court made clear that, in order to convict, the jury would have to find that petitioners participated in "a scheme substantially the same as the one alleged in the indictment" (*id.* at C78). As the court of appeals found (*id.* at B11), the SBA scheme charged in the indictment was "a kickback scheme causing tangible loss to the SBA" (see Indictment 14-20, 72-81). See *Piccolo,* 835 F.2d at 520 (upholding mail fraud conviction under *McNally* where jury instructions defined

scheme as one to defraud victim both of the intangible right to the honest services of its employee *and* of money); cf. *United States* v. *Horton,* 847 F.2d 313 (6th Cir. 1988) (upholding mail fraud convictions under *McNally* where indictment charged that scheme deprived victim of intangible rights and of money); *United States* v. *Wellman,* 830 F.2d 1453, 1463 (7th Cir. 1987) (same).

Although the ATAP scheme was not presented to the jury under the *Carpenter* rationale of theft of confidential business information, the court of appeals correctly concluded (Pet. App. A40) that the jury instructions permitted it to affirm on that basis. The ATAP counts in the indictment alleged a bid-rigging scheme involving the circumvention and manipulation of the Postal Service's procurement processes (Indictment 8-14, 55-58, 68-72), and the jury instructions required the jury, in order to convict, to find that petitioners engaged in the scheme that was alleged in the indictment (Pet. App. C78). Furthermore, the district court's instructions specifically required the jury to find an enterprise whose purpose was to enrich itself unjustly "from the proceeds of government contracts and subcontracts for computer services and equipment which had been and would be obtained by means of bribery, fraud and circumvention of government contracting procedures" (*id.* at C50). Thus, as the court of appeals concluded, "the factual predicate for the jury's verdict necessarily implies that it found that Jackson stole confidential information in violation of the mail fraud statute as interpreted in *Carpenter*" (*id.* at A46).

Jackson argues (87-7011 Pet. 9) that the decision below is inconsistent with cases involving other statutes (not decided under the plain error standard) in which courts have refused to apply harmless error analysis to jury instructions that omit an essential element of the crime. In *Pope* v. *Illinois,* No. 85-1973 (May 4, 1987), however, this

Court specifically held that harmless error analysis applies to instructional errors relating to the elements of the offense. Moreover, in none of the cases that Jackson cites did the court suggest that such an omission would require reversal where, in light of the instructions that were given, the verdict demonstrated that the jury necessarily found the element concerning which it was not specifically instructed. Cf. *Rose* v. *Clark*, 478 U.S. 570, 580-581 (1986) (presumption of malice instruction in murder prosecution would be harmless error if the predicate facts that the jury found necessarily showed that the defendant intended to kill); *United States* v. *Jacobs*, 475 F.2d 270, 283 (2d Cir.) (upholding conviction on the ground that, if the jury found conspiracy under an erroneous theory, it necessarily found every element necessary to convict under the correct theory), cert. denied, 414 U.S. 821 (1973).[7]

---

[7] Jackson also contends (87-7011 Pet. 12-14) that the prosecutor committed reversible error when he mentioned during the rebuttal portion of his closing argument that a civil statute, 41 U.S.C. 51, since amended, created a conclusive presumption that the cost of kickbacks received by government employees is borne by the government (Tr. 7036-7037). In its opinion denying petitioners' motion for release pending appeal, the court below determined that if the comment was erroneous any error was harmless—indeed, that it did not even "raise a close question" (Pet. App. B14). As the court explained, to convict on the SBA counts the jury necessarily found that the defendants obtained kickbacks and, under the facts of this case, it necessarily followed that the SBA lost money. That essentially factual determination was correct and does not warrant this Court's review.

Jackson also errs in relying on this Court's decision in *Rose* v. *Clark*, *supra*, in connection with his argument that reversal is warranted because the jury was told by the prosecutor to presume that the SBA bore the cost of the kickbacks. In that case, the Court held that the trial judge erred in instructing the jury in a murder case that malice could be presumed. The Court remanded for a determination whether the error was harmless, recognizing that the error did not affect the jury's verdict if the predicate facts found by the jury necessarily led to

Taking a different tack, Perholtz acknowledges (87-1946 Pet. 12) that the jury "was instructed as to a monetary deprivation," but argues (*id.* at 13-14) that the jury instructions were flawed because they also contained intangible rights language. But the whole point of the court of appeals' decision was that the jury could not have concluded that petitioners engaged in the fraudulent scheme alleged in the indictment without finding both a deprivation of intangible rights *and* a deprivation of property rights; the two were so interrelated that one necessarily implied the other. Indeed, the district court did not even separate the two theories in its instructions or tell the jury that it could convict on the basis of one without the other. In these circumstances—where despite the intangible rights language in the instructions it is clear that the jury found a property deprivation—the inclusion of intangible rights language does not constitute plain error. See *Piccolo,* 835 F.2d at 520; *Richerson,* 833 F.2d at 1157-1158.

Perholtz contends that review is warranted because "[t]he reactions of the Courts of Appeals to *McNally* have varied" (87-1946 Pet. 10). As he states, a number of courts of appeals have affirmed mail fraud convictions even though the jury instructions contained intangible rights language, while other courts of appeals have reversed convictions obtained prior to *McNally*. Contrary to Perholtz's contention, however, there is no conflict among the circuits on this issue. To determine whether a conviction should be overturned in cases in which the jury instructions did not anticipate the *McNally* decision, a court must review the evidence at trial and the jury instructions that

---

a finding of malice (478 U.S. at 580-581). Accordingly, *Rose* v. *Clark, supra,* supports the approach of the court below in finding that any error in the prosecutor's remarks did not affect petitioners' substantial rights because the predicate facts found by the jury showed that the SBA lost money.

were given. Where no objection has been lodged, the court must further determine whether any error in the instructions satisfies the plain error standard. Where, as here, it is clear that the jury must have concluded that the victim of the fraudulent scheme was deprived of a property interest, then the convictions should be affirmed. While in some cases courts have not been able to conclude that the jury found that the victim was deprived of a property interest and have reversed mail fraud convictions obtained prior to *McNally*, the differing outcomes of different cases do not reflect a difference in the legal principles being applied, but rather differences among the instructions given and the particular facts of each case. Moreover, the issue raised in this case—the adequacy of instructions given in pre-*McNally* trials—is not one of continuing importance. *McNally* was decided more than a year ago, and it is unlikely that there will be many more cases that were tried on an intangible rights theory that have yet to come before the courts of appeals. For that reason as well, review by this Court is not warranted.

CONCLUSION

The petitions for a writ of certiorari should be denied.

Respectfully submitted.

CHARLES FRIED
Solicitor General

EDWARD S.G. DENNIS, JR.
Acting Assistant Attorney General

JOEL M. GERSHOWITZ
Attorney

JULY 1988

U.S. GOVERNMENT PRINTING OFFICE 1988—202-037/60544